



American Recovery and Reinvestment Act (ARRA): Compliance Guidelines for Montgomery County Government

Office of the County Attorney

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Introduction

Complying with the American Recovery and Reinvestment Act (ARRA)

The American Recovery and Reinvestment Act (ARRA) imposes significant reporting requirements and tracking of performance as part of its transparency and accountability provisions. This document is intended to describe the general reporting requirements as interpreted by the federal government and explain the processes the County has put into place to ensure compliance. This document is intended to provide general guidance and instructions. Individual ARRA grants or ARRA funded contracts may have additional and/or overriding requirements and should be thoroughly examined by grant and contract administrators to ensure the guidance provided in this document is applicable.

This document is divided into three chapters:

Chapter 1. ARRA Requirements

Overview of the general regulatory framework which applies to expenditure of funds under ARRA.

Chapter 2. County Processes and Procedures to Comply with ARRA Requirements

Montgomery County processes and procedures for compliance with the federal requirements for funds received under ARRA.

Chapter 3. ARRA Compliance Committee

Outline of the roles and responsibilities of the ARRA Compliance Committee which will provide oversight for the ARRA grant implementation process to ensure departments comply with applicable federal, State and local laws and policies.

Chapter 1

ARRA Requirements

This section represents an overview of the general regulatory framework which applies to expenditure of funds under ARRA. It discusses two significant overlays on ARRA funding involving required reporting by program recipients and Buy American provisions, as well as a application of the Davis Bacon Act and whistleblower protection principles. By focusing on these issues this chapter is not intended to suggest any change in the applicability of other laws and regulations which normally dictate standards or procedures for expenditure of federal funds. The processes put into place by the County are presented in section two.

(a) Quarterly Reports on Use of Funds

The Federal Office of Management and Budget (OMB) issued guidance on June 22, 2009 regarding the Reports on Use of Funds under Section 1512 of ARRA. This guidance may not be the last word. Initial reports under Section 1512 requirement are due by October 10, 2009, covering the period from February 17, 2009 to September 30, 2009, and there may be additional interpretations between now and then.

An important initial point to consider is whether the County is considered the award recipient (and thus clearly required to report under this requirement) or the sub-recipient (and thus with lesser or minimal reporting requirements). If the County receives ARRA funds directly from a federal agency, it is the recipient. If it then hires a contractor to complete a project with the funding, the contractor is the sub-recipient or vendor.

Alternatively, if the County receives its funding from an intermediary source (i.e., the State) then the State agency would generally be the recipient and the County would be a sub-recipient. A State agency may attempt by agreement or regulation to delegate its reporting requirements to the County level.

Generally, award recipients are required to submit quarterly reports that include the following:

- Total amount of funds received from the federal agency;
- Of the amount received, the amount spent or obligated to projects and activities;
- A list of projects and activities funded by name, including:
 - Description of the project/activity;
 - Evaluation of completion status;
 - Estimates on jobs created or retained; and
- Details on sub-awards and vendor payments exceeding \$25,000.

If a recipient receives the grant directly from a federal agency, it must use Standard Form 269 for reporting expenditures and Standard Form 272 to report on the cash position of the grant. Both forms must be filled out and submitted electronically. The link to a sample Standard Form 269 is <http://www.whitehouse.gov/omb/grants/sf269.pdf> and the link to a sample Standard Form 272 is <http://www.whitehouse.gov/omb/grants/sf272.pdf>.

If the recipient receives ARRA funding indirectly, through the State for example, it must use forms and methodology prescribed by the State. Although the format of the reports may vary from one State agency to another, the information included is likely to be the same as required by the federal government.

The OMB June 22, 2009 guidance clarifies previous guidance and issues detailed information concerning the logistical reporting process. For the detailed logistical reporting process, see the OMB supplemental guidance, *Recipient Reporting Data Model* at <http://www.recovery.gov/sites/default/files/FedRptgDataModel.doc>. Moreover, for a list of programs subject to Section 1512 requirements, see OMB supplemental guidance, *Supplemental 1 – List of Programs Subject to Recipient Reporting* at http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21-suppl.pdf.

(b) Reporting Jobs Creation Estimates

Information Required

Section 1512 requires that recipients of ARRA funds report an estimate of jobs *directly* created or retained as a result of program and projects funded by ARRA.

- Definitions¹
 - A “job created” is a new position created and filled or an existing unfilled position that is filled because of ARRA.
 - A “job retained” is an existing position that would not have been continued to be filled without ARRA.
 - A job cannot be counted as both created and retained.
 - Employment impact on materials, suppliers, and central service providers and/or on the local community are not direct jobs.
- Jobs estimate must be expressed as "full-time equivalents" (FTE)
 - Calculated as total hours worked in jobs created/retained divided by number of hours in a full-time schedule (defined by the recipient).
 - FTE estimates must be reported cumulatively each calendar quarter.
- Required aggregate number
 - An aggregate number is required for the number of cumulative jobs created or retained for the quarter.

¹ For detailed definitions, see 74 Federal Register 14824 (April 23, 2009).

- Only direct employment should be considered.
- Employees who provide critical indirect support (clerical/administrative) are NOT counted as jobs created/retained.
- Narrative Description of employment impact
 - Brief description of the types of jobs created or retained.
 - May rely on job titles, broader labor categories, or the recipient's existing practice for describing jobs (terms must be widely understood and describe the general nature of the work).

Recipients must report for all projects and activities or federally awarded contracts regardless of whether their projects are funded in whole or in part by ARRA, but should report only on the jobs and funding attributable to an award under ARRA.

Methodology for Calculating Number of Jobs Created/Retained

In determining "full-time equivalent" (FTE) jobs, use the below calculation which converts part-time or temporary jobs into FTE jobs. To perform the calculation, a recipient will need the total number of hours worked that are funded by ARRA and the number of hours in a full-time schedule for a given quarter. The formula for reporting can be represented as:

$$\frac{\text{Cumulative ARRA Funded Hours Worked (Qtr 1...n)}}{\text{Cumulative Hours in a Full-time Schedule (Qtr 1...n)}} = \text{FTE}$$

Reporting is cumulative across the project lifecycle, and will not reset at the beginning of each calendar or fiscal year.

Reporting Job Estimates for Sub-Recipients

Federal OMB clarification that recipients must report jobs estimates *for all sub-awarded* funds is an update from previous OMB guidance.

Prime recipients are required to generate estimates of job impact by directly collecting specific data from sub-recipients and vendors on the total FTE resulting from an ARRA grant.² In limited circumstances³, the prime recipient can employ an approved statistical methodology to generate estimates of job impact, thereby collecting data from a smaller subset of sub-recipients

² OMB is not requiring collection of jobs information from vendors (eg suppliers) but from sub-recipients (e.g. entities which assist in the actual functioning of the ARRA funded program). The County is, however, attempting to collect as comprehensive data as possible about the job impact of ARRA projects and funding. Therefore program managers should attempt to obtain data on job generation and retention from vendors benefiting from ARRA funded purchases, particularly from vendors engaged in major purchase transactions.

³ Where a comprehensive collection of jobs data from all sub-recipients and vendors is overly costly or burdensome and thus disrupts the prime recipients' ability to effectively implement the underlying mission of the program, a statistical methodology may be used for collection of job creation data.

and vendors in order to extrapolate an estimate of job impacts to all applicable sub-recipients and vendors.

(c) Mechanics of Reporting

Prime recipients can decentralize reporting at the prime recipient level and/or delegate reporting responsibilities to sub-recipients. If reporting is decentralized, careful attention must be paid to the inputting of reporting data to avoid double counting (See Chapter 1, Section (d) regarding *Data Quality Requirements*). Although the prime recipient is ultimately responsible for reporting required data and the quality of that data, the prime recipient is not required to certify or approve sub-recipient data.

Reporting recipients (either prime recipients or sub-recipients) must be registered with the below databases prior to initiating the reporting requirements⁴:

- Dun & Bradstreet System (D-U-N-S number)
- The Central Contractor Registration database (CCR)
- www.FederalReporting.gov

(d) Data Quality Requirements

Data quality reviews are intended to avoid material omissions and significant reporting errors. Material omissions occur when required data is not reported or reported information is not responsive to a specific data request. Significant reporting errors occur when required data is not reported accurately and potentially misleads the reader of the report. To ensure data quality, recipients and reporting sub-recipients should establish internal controls to ensure completeness, accuracy and timely reporting.

Data Quality Requirements Timeline

1-10 days following the end of the quarter (pre-submission status until submitted), prime recipients and delegated sub-recipients must prepare and enter their reporting information.

11-21 days following the end of the quarter (post-submission review), prime recipients are responsible for reviewing data submitted by sub-recipients. Where a recipient identifies a data quality issue with respect to information submitted by the sub-recipient, the recipient is required to alert the relevant sub-recipient of the nature of the problem identified by the recipient. All corrections by recipients and sub-recipients during this phase of the review must be transmitted by the 21st day of the reporting month.

⁴ Only prime recipients report directly to OMB and register. If the County is a direct recipient on an ARRA program, it must report. Sub-recipients do not report to OMB, but to their prime recipient., and so sub-recipients do not register with the Federal reporting website. The exception to this is if a prime recipient (eg the State) by agreement or condition has transferred the reporting responsibility downstream to the sub-recipient.

22-29 days following the end of the quarter, the official agency review process begins. The federal agency is responsible for reviewing data submitted by recipients and sub-recipients. Where an agency identifies a data quality issue, the federal agency is required to alert the relevant recipient of the nature of the problem. All corrections by recipients and sub-recipients during this phase of the review must be transmitted by the 29th day of the reporting month. **After the 29th day, no further corrections can be made.** Corrections that are identified but cannot be made by the 29th of the month will be incorporated into the following quarter's data report of the recipient or delegated sub-recipient.

(e) Submission of Reports to the Federal Government

Reports must be submitted through www.FederalReporting.gov, via the below methods:

- Online data entry in a Web browser;
- Excel spreadsheet; or
- Custom software system extract in XML.

Please refer to data dictionary of the above methods via *Recipient Reporting Data Model* at <http://www.recovery.gov/sites/default/files/FedRptgDataModel.doc>.

Data in each quarterly report must be cumulative to show the total amount of funds expended to date. For example, the first reporting is due on October 10, 2009, and this should include funding from February 17, 2009 (the date that ARRA was enacted) through September 30, 2009. Each subsequent quarterly report must also be cumulative.

ARRA reporting elements cannot be combined with existing federal reporting requirements.

Reporting Deadlines

No later than the 10th day after the end of each calendar quarter.

Initial Reporting

The first reporting period will be the quarter ending September 30, 2009. Therefore the first reporting deadline is October 10, 2009. No waivers will be granted for deadlines; extensions may be granted on case-by-case basis.

Non-Compliance in Reporting

Non-compliance with the reporting requirement is considered a violation of the ARRA grant award agreement. The awarding agency may use customary remedial measures to ensure compliance, including withholding funds, termination, or suspension and debarment.

Additionally, non-compliance with data quality requirements may also result in termination of funding or even civil/criminal penalties in cases of intentional reporting false information for the prime recipient, sub-recipient, or both.

(f) Buy American Requirements

ARRA's "Buy American" clause (Section 1605) requires that when grant funds traceable to ARRA are used by the County, regardless of whether directly granted from federal agencies or passed through State entities, the County as a public institution must abide by Buy American requirements on building construction, repair and renovation projects.

There are significant potential consequences for non-compliance. The Buy American requirements "flow down" from the federal agency to bind the entity doing the contracting. The best compliance practice is for the County to similarly "flow down" the requirements to its architecture and engineering consultants, and require that certification of compliance with Buy American be part of all prime construction contracts funded with ARRA grants. Experienced construction contractors involved in ARRA funded work anticipate the assumption of these 'pass through' responsibilities.

On March 31, 2009, the Federal Acquisition Regulation Council released the interim final rules regarding ARRA, specifically the Buy American Requirements for Construction Material.⁵ It is clear from these rules that the County as a unit of government would have all its building construction or public works activities covered by ARRA's Buy American clause.

Iron, Steel and Manufactured Goods

Under these rules, American iron, steel, and manufactured goods are required in the construction, renovation, maintenance and repair context. Although certain federal agencies have issued specific guidance relative to projects which they fund, it is clear that the Buy American standards cover items used in the physical structure of a public building or public work. For example, an HVAC unit or windows would be subject to the requirement, whereas building furnishings or computer software used in the building would probably not be covered.

An important distinction in the rule between the ARRA Buy American provision and the "traditional" Buy American rules applicable to transit and highway projects under prior law, is that the ARRA definition of "manufactured good" centers on the fact of assembly of the good in the United States, but before it gets to the construction site. The origin of the original components is not a factor. For example, a furnace which is made up of pumps and motors from Belgium or Brazil could be assembled at a factory in Baltimore and be deemed an American good for purposes of this rule.

Specific Agency Interpretations

ARRA's Buy American requirements apply to all agencies whose ARRA funds are used for public construction projects. However, the new ARRA requirements do not replace or modify

⁵ 48 C.F.R. pts. 1, 5, 25, 52. (2009). Federal Acquisition Regulation; FAR Case 2009-008, American Recovery and Reinvestment Act of 2009—Buy American Requirements for Construction, Interim Rule, 74 Fed. Reg. 14623-14633 (March 31, 2009).

the slightly different requirements utilized for the past 20 years by the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA). Both agencies have announced they will apply their traditional rules and procedures in using ARRA funds on highway and transit projects.

The Environmental Protection Agency has issued a few waivers, including one nationwide waiver for utilization of small parts which are *de minimus* components of buildings and projects.

There may be additional waivers and interpretations as the pace of ARRA funded construction increases. Under the current federal rules, exceptions may be granted based on the following: public interest, non-availability, and price-differential.

- Public Interest Waiver
 - Application of the requirements would be inconsistent with the public interest.
 - Conditions to grant waiver: determined by Administrator - case specific
 - Upon granting public interest waiver, the Administrator will issue a detailed written statement justifying why the waiver is in the public interest. The Administrator must publish this justification in the Federal Register.
- Non-Availability
 - Administrator finds that the materials for which a waiver is requested are not mined, produced in or manufactured in the United States in *sufficient and reasonably* available quantities and of a satisfactory quality.
- Price-Differential
 - Administrator finds the inclusion of a domestic item or domestic material will increase the cost of the entire project more than 25 percent.
 - Given the above restriction, this waiver would be difficult to obtain.
- Application for Waivers (not every agency has formal procedures but these procedures are typical)
 - Only grantees may make the written request.
 - Written request includes facts and justification to support the waiver.
 - Applications should be submitted to the Administrator through the appropriate Regional Office.
 - Upon receipt and review of the waiver application, the Administrator will issue a written determination setting forth the reasons for granting or denying the exception request. Each request for an exception, and FTA's action on the request, are available for public inspection and published in the Federal Register.

Remedies: What Happens if there is a Violation?

Federal officials have significant powers to "unwind" a project that ignores Buy American requirements. These requirements flow down to States or other entities making ARRA funded grants. The award official for the State or other agency is responsible for ARRA compliance issues. Allegations of Buy American issues would be reported to the award official, who will

review the allegations. (See new Section 2 CFR 176.130). If unauthorized steel, iron, or manufactured goods are used, the award official can:

1. Determine that Section 1605 does not apply;
2. Require the removal and replacement of the unauthorized material;
3. Retain the unauthorized material and reduce the amount of the award by the cost of the unauthorized material; or
4. Withhold cash payments pending correction, suspend or terminate the entity, bar the violating entity from further awards or contracts, and refer the matter to the appropriate officer for a criminal investigation.

(g) Whistleblower Protection

Under existing federal laws, regulations and OMB Circulars regulating the expenditure of federal funds, the County must manage and expend awarded federal funds appropriately. Federal Inspectors General, as well as other federal audit and investigatory authorities, already have wide access to County records in connection with the use of federal funds.

ARRA does not lessen the existing responsibilities of the County to properly manage and account for the use of federal funds. The notable difference in ARRA (Section 1553) is the extension of investigatory powers the Inspector General and other authorities have to relevant personnel of the County's contractors, subcontractors, or other recipients of funds pursuant to a contract. The Inspector General of a federal agency may follow up on complaints of not only County employees but contractor employees and subcontractor employees concerning the expenditure of ARRA funds, and neither a public employer such as the County nor a private contractor may take any reprisal against the employee.

Specifically, any employee (County or private contractor) who alleges he or she is “whistle blowing” or disclosing information about gross mismanagement or waste of stimulus funds made available by ARRA, is protected from reprisal (discharge, demotion and other discrimination) for disclosures to a broad group of governmental authorities, including Inspectors General, Congress, federal agencies, law enforcement agencies or a supervisory employee.

The types of protected disclosures include:

- Gross mismanagement of an agency contract or grant relating to covered funds;
- Gross waste of covered funds;
- A substantial and specific danger to the public health or safety related to the implementation or use of covered funds;
- An abuse of authority related to the implementation or use of covered funds; and
- A violation of law, rule, or regulation related to an agency contract or grant awarded or issued using ARRA funds.

An employee complaining of reprisal must inform the Inspector General of the funding agency, but may also in certain circumstances independently bring an action in federal court against the employer.

The standards for federal money management have not changed, but the protections for someone who files a complaint have been significantly strengthened, especially for employees of private contractors who are being paid with ARRA funds. The County and its contractors (certainly its major contractors) should maintain programs and procedures to manage the risk, to detect and remediate instances of mismanagement, fraud, waste, or unlawful use of ARRA funds, and properly record and act upon reports. Managers and supervisors in particular should be informed and trained to immediately report and pass on information regarding any allegations of ARRA fund misuse.

(h) Davis-Bacon Act

The Davis-Bacon requirements of ARRA (Section 1606) mirror existing laws and apply broadly to all ARRA funded construction projects. Specifically, laborers and mechanics employed by contractors and subcontractors on ARRA funded projects for construction, alteration, maintenance or repair (including painting and decorating) must be paid the prevailing wages listed in the wage determination included in the contract. The standard Davis-Bacon contract clauses should be included in relevant contracts and subcontracts exceeding \$2,000. Contractors and subcontractors on covered projects must pay wages on a weekly basis and submit weekly certified payroll records to the contracting or administering agency.

(i) Commingling of Funds

ARRA funds are intended to be supplementary to but not a substitute for current governmental funding. The reporting requirements for both ARRA funding use and job creation and retention are premised on measuring the impact of ARRA funding, not all government funding of a particular program. For that reason OMB requires the specific tracking and reporting of ARRA funding. The issue is whether the County, years after an ARRA project, has set up its funds in such a way as to allow a clear audit trail to verify the reported use and job generation of the ARRA funding as opposed to other funding which may be conventionally available. Thus the County is developing the accounting codes to clearly track and follow the flow and impact of ARRA funds.

(j) Expedited Appropriation of ARRA Grant Award

Many ARRA grant awards specify a two year grant term to implement a program. The step towards program implementation is to appropriate the funds and it is therefore in the County's best interest to expedite the appropriation of these grants. See Chapter 2, Section (j) for further discussion of this issue.

Chapter 2

County Processes and Procedures to Comply with ARRA Requirements

This section outlines the forms and procedures put into place by County to comply with requirements for funds received under ARRA. It also identifies the party responsible for reporting each ARRA requirements. These forms and procedures are intended to support the requirements of all the provisions described above. They may not apply to all grants or contracts received by the County under ARRA. Similarly, there may be additional requirements imposed by the granting agency.

(a) Quarterly Reports on Use of Funds

The Department of Finance will continue to be responsible for preparing and submitting quarterly financial reports. New programs and capital projects financed with ARRA grants are identified by ARRA specific codes in the County's financial system (FAMIS). Sub-fund 10-120-020 was created in the Grants Fund and sub-fund 40-401-051 was created in the Capital Fund. As departments establish new purchase orders and obtain goods and services, expenditures and encumbrances will be accumulated in the new ARRA codes. Quarterly financial reports will be prepared based on the financial information recorded in the new codes.

Recipients of ARRA funding are required to report on funds spent and obligated cumulatively through the end of each quarter. Generally, recipients are required to include amounts previously reported, amounts spent/obligated during the quarter and the cumulative amounts. The same information is also required to be included for matching funding, when applicable.

If the recipient receives the grant directly from a federal agency, it must use Standard Form 269 for reporting expenditures and Standard Form 272 to report on the cash position of the grant. Both forms are filled out and submitted electronically. The link to a sample Standard Form 269 is <http://www.whitehouse.gov/omb/grants/sf269.pdf>, and the link to a sample Standard Form 272 is <http://www.whitehouse.gov/omb/grants/sf272.pdf>.

If the recipient receives ARRA funding indirectly, through the State for example, it must use forms and methodology prescribed by the State. Although the format of the reports may vary from one state agency to another, the information included is usually the same as required by the federal government.

(b) Reporting Jobs Creation Estimate

The County departments recipients of ARRA grants will be responsible for estimating and reporting jobs created and/or retained. The department must also send a copy to CountyStat.

The County has created two forms to assist in the collection and reporting of job creation and/or retention information. The first form lists the steps and procedures a department should follow when reporting on jobs created by a sub-contractor/grantee of Montgomery County (see Appendix E). The second document lists the steps a department should follow when the jobs created and/or retained are direct County employees (see Appendix F). For further information about collecting and reporting these requirements contact Chris Cihlar in the CountyStat office at 240-777-2627. If you need information or assistance in establishing the appropriate sub-object codes please contact Mauricio Delgado in the Department of Finance at 240-777-8804.

On a quarterly basis each departmental designee(s) must report aggregate employment information to the federal government. Only one designee should be assigned per ARRA grant. Appropriate designees may include: contract monitors, program administrators, and grant administrators. If a department has more than one of these positions involved with the use of their funds, they should coordinate to ensure accurate reporting. CountyStat must be copied on all submissions.

If a County department is a sub-recipient and not required to report to the federal government, the Contract Administrator in each department still needs to collect job information and send it to CountyStat on a quarterly basis. This applies even if funds are contracted out. This information is essential to collect so that the County can report on the total number of jobs it has helped to create.

(c) Reporting Requirements

This section describes the processes and procedures that County departments must use to satisfy the federal requirements set forth in Chapter 1, Section (c) through (e) of this guidelines, including mechanics of reporting, data quality requirements, and submission of reports to federal government.

Section 1512 of ARRA imposes quarterly reporting requirements on all recipients of federal stimulus funds. The reporting requirements apply to all activities and projects that receive any ARRA funds in any amount. The first reporting deadline is October 10, 2009, and this report must include information from February 17, 2009 through September 30, 2009. If ARRA funds were awarded between February 17, 2009 and June 30, 2009, direct recipients must collect and maintain all relevant information responsive to the reporting requirements, and this information must be included in the quarterly report due on October 10, 2009. Each subsequent quarterly report will be cumulative. The reporting requirement begins in the quarter in which a federal award is made to the County. All reporting information must be submitted through www.FederalReporting.gov and reporting recipients must be registered as authorized parties prior to reporting. Temporary guidance was published in the Federal Register (FAR 52.204-11) <http://www.acquisition.gov/far/current/html/FARTOCP52.html> and guidance can also be found in the June 22, 2009 OMB Implementing Guidance Memorandum http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21.pdf.

Prime recipients, also known as direct recipients, are County departments that receive ARRA funds directly from a federal agency in the form of grants, loans, or cooperative agreements. A sub-recipient includes County departments that receive ARRA funds from a prime recipient but does not include an individual who is the beneficiary of the program. The quarterly reporting requires information from both the prime recipient and the sub-recipient. The County may be a prime recipient for some grants and a sub-recipient for other grants. For example, if the federal agency disbursed ARRA funds directly to the County for use by the County, the County is a direct or prime recipient. If the federal agency disbursed the ARRA funds to a state agency, and the state agency disbursed the funds to the County, the County is a sub-recipient. The state agency may require information from the County as a sub-recipient or may delegate the direct reporting requirements to the County. The grant administrator for each department will need to carefully review the grant award to determine the precise reporting requirements for each grant.

A vendor is a dealer, distributor, merchant, or other seller of goods or services that is required for implementation of the program or project supported by ARRA funding. A vendor is not subject to the terms and conditions of ARRA. However, the direct recipient or sub-recipient is required to provide a limited amount of information on vendors in the quarterly reports.

All reporting requirements are subject to change. In addition, state agencies or federal agencies may impose additional reporting requirements on local agencies that receive ARRA funds. You should comply with any additional reporting requirements and guidance set forth by either the state or federal agency providing ARRA funds or the agreement governing the ARRA funds received.

(d) Additional Terms and Conditions Related to ARRA

This section describes the processes and procedures that County departments must use to satisfy the federal requirements set forth in Chapter 1, Sections (f) through (h), including Buy American Requirements, Whistleblower Protection, and the Davis-Bacon Act.

There are certain core terms and conditions in addition to or superseding County terms and conditions that are required in order to be in compliance with ARRA funding requirements; there may also be additional grant specific requirements. To assist departments in meeting this requirement, an instruction sheet, along with an Addendum to ARRA funded contracts outlining general requirements to be attached to any solicitation that is being issued with ARRA funds, has been developed and is attached at the end of this master document. See Appendix A for the instruction sheet. See Appendix B for the Addendum. Departments are required to follow the Addendum sheet and attach this Supplement to ARRA funded solicitations and incorporate into contracts, along with any additional requirements related to your specific grant.

(e) Commingling of Funds

Since a large percentage of ARRA funding was channeled through existing federal grants, and to be able to report on activities/projects and jobs created or maintained only by ARRA funds, the County created a new coding structure in its financial system to isolate ARRA financial records. New sub-funds were created in the grants fund and capital-projects funds to accumulate only ARRA expenditures. Also a new sub-object code was created to accumulate only ARRA funds received. In addition to make ARRA financial records readily available for reporting, the new coding structure will increase the likelihood of positive results in future audits.

(f) Expedited Appropriations for ARRA Grants

As a first step towards implementing ARRA grant awards, these funds must be appropriated through either a County Executive transfer of appropriation from the Future Federal, State, or Other Grants Non-Departmental Account (NDA) to the appropriate fund to support the grant program, subject to conditions on the use of this transfer authority, or through a Council Supplemental or Special Appropriation. In many cases ARRA awards specify that the funds must be spent within two years. In order to expedite the appropriation and procurement processes, one of these three funding actions should be completed as soon as possible.

Council Resolution (CR16-1049), introduced and adopted July 21, 2009, amends Resolution 16-970, the FY10 Operating Budget Resolution Montgomery County Government (CR 16-970), Budget Provision Number 8 entitled *Use of the Future Federal, State, or Other Grant non-Departmental Account as an Appropriation Mechanism for Certain Grants*, a copy of this resolution may be found in Appendix C: Council Resolution 16-1049. Subject to the balance in this account, grants funded by ARRA, may use the commonly referred to Executive Supplemental process provided “no new County position will be created under or funded by the grant award”, and the grant award must not require any new FY10 tax-supported appropriation or future tax-supported County funds. To use this mechanism, the Notice of Grant Award must be in receipt of the County. The link to CR 16-1049 is

http://www.montgomerycountymd.gov/content/council/pdf/res/2009/20090721_16-1049.pdf.

Departments preparing an Executive Supplemental must indicate on the narrative section of the Budget Entry form that the Executive Supplemental is for an ARRA supplemental.

Alternatively, if the grant award does not meet any of the five conditions in CR 16-1049, departments should prepare a Special Appropriation for transmittal to the County Council by the County Executive. Grants with any new positions created under or funded by ARRA grants must follow this route, regardless of whether the grant award is over or under \$200,000. A template for Special Appropriation related to ARRA grants can be found at http://portal.mcgov.org/content/departments_intranet/omb/forms/Suppl/template_psp_arraspecial_appn2.doc. See Appendix D: Special Appropriation Template. A new provision is included in the Special Appropriation resolution that “Any funds appropriated in this resolution must not be spent for any purpose until two days after the Council has received from the County Executive a copy of the grant award letter from the federal or State government which provides all funds to be spent”. Departments should send a copy of the grant award to Beryl L. Feinberg, OMB, for transmittal to the County Council on behalf of departments.

Departments with questions about the process to follow should contact Beryl L. Feinberg at 240-777-2768.

Chapter 3

ARRA Compliance Committee

A Grants Compliance Committee has been established to provide oversight to the ARRA grant implementation process and to help ensure the using departments' compliance with applicable federal, State and local laws, regulations and policies, as well as with the specific terms of any grant award or sub-award received by Montgomery County.

The Committee will be chaired by the County Attorney or his designee, and will include an Assistant Chief Administrative Officer, the Director of the Department of General Services, the Director of the Department of Finance, and the Director of the Office of Management and Budget, or their respective designees. The Committee will be responsible for periodic review of each Department's processes for ensuring compliance and their actual compliance with applicable requirements. The process should include both the receipt of relevant documentation by the Committee and also direct meetings between the Committee and relevant managers charged with implementation.

Departments should expect to provide the following information to the Committee upon request:

1. A copy of the grant application, and any incorporated or otherwise related documents, directives or circulars;
2. A copy of the grant award, along with any specific conditions imposed on the use or administration of the grant funds;
3. Copies of any reports or claims submitted either to the State or to the federal government;
4. Copies of any regulations or policy guidance pertaining to compliance with the subject grant; and
5. Copies of any MOUs, agreements, contracts, or sub-contracts arising out of the grant.

The Committee will review the documents received, and will also hold meetings with each using department, and where applicable, department counsel, to discuss at least the following items:

1. The using department's understanding of the compliance requirements associated with their grant;
2. The steps taken by the using department to ensure compliance with all applicable laws, regulations, and other requirements of the grant;
3. Any incidents of non-compliance and measures taken to remedy the non-compliance; and
4. Any recommendations for future compliance-related activities.

Appendix-A

Explanation of ARRA Addendum to ARRA Funded Contracts

The attached solicitation addendum has been developed by the County Attorney's office as general requirements to be attached to any solicitation that is being issued with stimulus (ARRA) funds. Please note these general requirements are approved as of this date. As changes in ARRA requirements occur, if any, this addendum will be modified. All department Directors will be notified accordingly. It is important to stress that these are general requirements only; each department is still required to review their particular grant for any grant specific requirements that may need to be added to this addendum or determine if other modifications to this addendum are required based on specific grants. For questions related to terms and conditions of ARRA grants, please contact Scott Foncannon, County Attorney's office at 240-777-6795.

Please note that from the information we have received to date, it is unlikely that existing contracts can be used for ARRA funded work and it is unclear whether ARRA grants authorize existing contracts to be amended to incorporate ARRA requirements. To verify, please contact the granting agency directly, and receive confirmation in writing before proceeding with an existing contract.

Appendix B

Addendum to ARRA Funded Contracts: Additional Terms and Conditions

Work performed under this Contract or grant will be funded, in whole or in part, with funds appropriated through the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (the “Recovery Act” or “ARRA”). The Recovery Act’s purposes are to stimulate the economy and to create and retain jobs.

The following supplemental terms and conditions apply to the work performed under this Contract. In the event of conflict between the other terms and conditions of this Contract and this ARRA Supplement, the terms and conditions of this ARRA Supplement will govern.

The Contractor shall cooperate with the County with respect to the County’s reporting requirements under Section 1512 of the Recovery Act, as such requirements may be amended or clarified by law or regulation from time to time, by providing any information requested by the County or by other authorized federal or State authorities related to such reporting requirements.

The Contractor must comply with all requirements of ARRA. If the Contractor believes there is any inconsistency between ARRA requirements and current contract requirements, the Contractor must refer the issues to the Contract Officer for reconciliation.

Be advised that special provisions may apply to projects funded by ARRA that relate to:

- Reporting, tracking and segregating incurred costs;
- Reporting on job creation and preservation;
- Publishing information on the Internet;
- Protecting whistleblowers; and
- Prompting referral evidence of a false claim to the Inspector General.

Wage Rates

In addition to the County’s wage requirement law under Section 11-B-30(A) of the County Code, under Section 1606 of the Recovery Act, all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the federal government pursuant to ARRA must be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan numbered 14 of 1950 (64 Stat. 1267, 5 U.S.C. App.) and section 3145 of title 40 United States Code. See 2 CFR §§176.80 et seq. See also <http://www.dol.gov/esa/whd/contracts/dbra.htm> (re Davis-Bacon).

Publication

Information about this Contract may be published on the Internet, including on the website www.recovery.gov, maintained by the Federal Recovery Accountability and Transparency Board (the “Board”).

Registration Requirements

Contractors and all first-tier subcontractors must obtain a Data Universal Numbering System (“DUNS”) number (or update the existing DUNS record).

Whistleblower Protections under ARRA

- (a) Section 1553 of the Recovery Act provides certain protections for whistleblowers.
- (b) Under Section 1553(e), the Contractor must post notice of the rights and remedies for whistleblower protections provided under Section 1553. A copy of the notice is attached to this Supplement. Specifically, the Contractor must post Section 1553 itself, which is also attached to this Supplement.
- (c) The Contractor must include the substance of this clause including this paragraph (c) in all subcontracts.
- (d) Contractor cannot discharge, demote, or otherwise discriminate against an employee as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee’s duties, made to the Recovery Accountability and Transparency Board, an inspector general, the Comptroller General, a member of Congress, a State or federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover or terminate misconduct), a court or grand jury, the head of a federal agency or their representative, information that the employee reasonably believes is evidence of:
 - gross mismanagement of an agency contract or grant relating to covered funds;
 - a gross waste of covered funds;
 - a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
 - an abuse of authority related to the implementation or use of covered funds; or
 - a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

Accounts, Records, and Inspection

- (a) Accounts: The Contractor must maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting: all allowable costs incurred; collections accruing to the Contractor in connection with the work under this Contract, other applicable credits, negotiated fixed amounts, and fee accruals under this Contract; and the receipt, use, and disposition of all Government property coming into the possession of the Contractor under this Contract. The system of accounts employed by the Contractor must be

satisfactory to the County and in accordance with generally accepted accounting principles consistently applied.

- (b) Inspection and audit of accounts and records. All books of account and records relating to this Contract will be subject to inspection and audit by the State the federal government, or their designees at all reasonable times, before and during the period of retention provided for in paragraph (d) of this clause, and the Contractor must afford the County or the federal government proper facilities for such inspection and audit.
- (c) Audit of subcontractors' records. The Contractor also agrees, with respect to any subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the contracting officer.
- (d) Disposition of records. Except as agreed upon by the County, the government and the Contractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the Contractor in connection with the work under this Contract, other applicable credits, and fee accruals under this Contract, will be the property of the County and/or the government, and will be delivered to the County, the Government or otherwise disposed of by the Contractor either as the Contract Administrator may from time to time direct during the progress of the work or, in any event, as the Contract Administrator will direct upon completion or termination of this Contract and final audit of accounts hereunder. Except as otherwise provided in this Contract, all other records in the possession of the Contractor relating to this Contract must be preserved by the Contractor for a period of 6 years after final payment under this Contract or otherwise disposed of in such manner as may be agreed upon by the government and the Contractor.
- (e) Reports. The Contractor will furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this Contract as the contract administrator may from time to time require. The Contractor must indemnify the County and hold the County harmless for any failure by the Contractor to comply with the reporting requirements or assisting the County in meeting the reporting requirements in a timely manner.

The Contractor agrees to provide the County all of the information necessary to allow the County to report jobs retained and created. At a minimum the Contractor agrees to provide the County the following information on a monthly basis:

1. Total number of employees who worked any hours during a given month on an ARRA contract/grant. This is to be reported monthly.
2. Total number of hours worked on an ARRA contract/grant. This is to be reported monthly.

3. Average number of hours a full time employee would be scheduled to work over the course of a year. This is to be reported once in the contract application and/or upon award.

In the event additional information is necessary or requested to enable the County to meet the reporting requirements, the County will notify the Contractor and the Contractor will provide the additional information at no additional cost to the County.

Contractor agrees to submit quarterly reports to the County on financial and programmatic progress by the last day of the reporting quarter. Information from these reports will be made available to the public.

Contractor agrees to report the following programmatic information:

- status of the project or activity – what has been accomplished during reporting period.
- an estimate of the number and types of jobs created or retained by the project or activity. If contractor used vendors in project, include direct jobs created or retained by vendor.
- the impact, if any, on its workforce.

Contractor further agrees to provide the County with additional financial and programmatic information as required by the federal government due to amendments or clarifications by law or regulation.

Programmatic and Financial Reporting Periods	Due Dates
July – September	September 30
October – December	December 31
January – March	March 31
April – June	June 30

- (f) Inspections. The County and the federal government will have the right to inspect the work and activities of the Contractor under this Contract at such time and in such manner as they shall deem appropriate.
- (g) Subcontracts. The Contractor further agrees to require the inclusion of provisions substantively the same to those in paragraphs (a) through (l) of this clause in all subcontracts (including fixed price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.
- (h) Comptroller General, Inspector General.

- (1) Pursuant to Section 902 of the Recovery Act, the Comptroller General of the United States and his representatives are authorized to: 1) examine any records of the Contractor or any of its subcontractors, or any State or local agency administering such contract, that directly pertain to, and involve transactions relating to, the contract or subcontract, and 2) interview any officer or employee of the contractor or any of its subcontractors regarding such transactions.
 - (2) Section 1515(a) of the Recovery Act authorizes any representative of the Inspector General of a relevant federal agency to: (1) examine any records of the Contractor and any of its subcontractors, as well as the grantee or any State or local agency administering the Contract, that pertain to, and involve transactions relating to, the Contract or subcontract; and (2) interview any officer or employee of the Contractor, grantee, subgrantee, or agency regarding such transactions.
- (i) Pursuant to the regulations promulgated at 2 CFR Part 176, detailed information required by the Federal Funding Accountability and Transparency Act of 2006, as amended (the “Transparency Act”) must be provided. This information includes, but is not limited to the items listed below. The Contractor must provide any information required by the contract officer to meet this obligation.
1. The name of the entity receiving the award;
 2. The amount of the award;
 3. The transaction type;
 4. The funding agency;
 5. The Catalog of Federal Domestic Assistance number;
 6. The program source;
 7. The location of the entity receiving the award, including four data elements for the city, State, Congressional district, and country;
 8. The location of the primary place of performance under the award, including four data elements for the city, State, Congressional district, and country;
 9. A unique identifier of the entity receiving the award;
 10. A unique identifier of the parent entity of the recipient, should the recipient be owned by another entity; and
 11. The names and total compensation of the five most highly compensated officers of the company if it received (1) 80% or more of its annual gross revenues in federal awards; and (2) \$25M or more in annual gross revenue from federal awards.
- (j) Buy American: Requirements & Waivers For ARRA-Funded Contracts

General Bid Requirements and Definitions

The American Recovery and Reinvestment Act of 2009 (“ARRA”), Section 1605, prohibits the use of funds appropriated or otherwise made available under ARRA for a project for the construction, alteration, maintenance or repair of a public building or public work unless all of the iron, steel and manufactured goods used in the project are produced in the United States. ARRA mandates that this Buy American provision be applied in a manner consistent with United

States obligations under international agreements. Waivers of these requirements may be granted by the federal government under three circumstances:

- (a) Applying the domestic preference would be inconsistent with the public interest.
- (b) Iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- (c) Inclusion of iron, steel and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

Regulations have been issued by the federal Office of Management and Budget at 74 FR 18449, 18452 (April 23, 2009) clarifying and interpreting the above provisions and describing the waiver process in detail.

The requirement that “production” of the iron or steel used in the project occur in the United States means “that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.” 2 CFR §176.70(a)(i). In addition, there is no requirement with regard to the origin of components or subcomponents of manufactured goods used in the project, as long as the manufacturing occurs in the United States. 2 CFR §176.70(a)(ii).

The phrase “manufactured good” is defined as a good brought to the construction site for incorporation into the building or work that has been -- (i) Processed into a specific form and shape; or (ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials. 2 CFR §§176.140(a)(1) and 176.160(a).

Requirements for Bidders

In order for a bidder to comply with the requirements of ARRA, he or she must submit a bid based on permanently incorporating only iron, steel and manufactured goods produced in the United States in the construction of this project, except if the County has received a waiver prior to bidding and except to the extent provided for under the International Agreements section, below.

Buy American Waivers

As stated above, waivers of the Buy American requirement may be requested by the County or the State (where the ARRA funds pass through a State agency) to the federal agency awarding the funds if it can be demonstrated that (1) the use of domestic iron, steel or manufactured goods would be inconsistent with the public interest, (2) such materials and products are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality, or (3) inclusion of iron, steel and manufactured goods produced in the United States would increase the cost of the overall project by more than 25 percent.

If a bidder believes that iron, steel or manufactured products produced in the United States may be unavailable, he or she should first determine exactly which such item required by the contract specifications is not produced in the United States in sufficient and reasonably available

quantities and of a satisfactory quality. Next, the bidder should ascertain if a determination of unavailability for such item has already been made by the federal government. The items that have already been determined to be unavailable are listed in the Federal Acquisition Regulation, 48 CFR 25.104(a), which is made applicable to ARRA-funded contracts by 2 CFR 176.80(a)(1). If no waiver has previously been granted, the bidder must contact the County agency as soon as possible so that a waiver can be applied for and obtained by the County or the State prior to the bid opening date. If no action is taken on a waiver request based on unavailability by the bid deadline, the bid opening may need to be postponed. Bidders should also note that, for items that have already been determined to be unavailable, the regulation set forth at 2 CFR 176.80(a)(1) makes applicable the procedures set forth in 48 CFR 25.103(b)(1). Under those procedures, the prior determination of unavailability does not apply if the County agency learns at any time prior to the date that bids are due that an item on the list in 48 CFR 25.104(a) is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. In such event, the agency will send out an addendum to this solicitation.

If a bidder believes that the cost of domestic iron, steel and manufactured goods will increase the cost of the overall project by more than 25%, the bidder, in addition to submitting a bid based on incorporating only domestic iron, steel and manufactured goods, may also submit a bid based upon being allowed to permanently incorporate foreign iron, steel or manufactured goods into the work of the contract. If the bidder chooses to submit such a bid, the bidder should purchase an additional bid book for this contract and legibly print the following in ink on the bid cover and at the bottom of the proposal sheet which contains the phrase "Total gross sum written in words": TOTAL BID BASED UPON USING FOREIGN IRON, STEEL OR MANUFACTURED GOODS.

When bids are submitted based upon domestic and foreign iron, steel or manufactured goods, both bids shall be submitted in the same envelope. If, post-award, the contractor believes there exists the basis for a waiver, the contractor may submit a waiver request to the County. The request must include copies of all documentation verifying the unavailability of the material or product, and/or justification of the application for a waiver. Final approval of a request for a Buy American waiver request will be made by the relevant federal agency.

Award of Contract

Where the method of solicitation is an invitation for bids, award of this contract will be made to the lowest responsible bidder who submits the lowest total bid based upon furnishing domestic iron, steel and manufactured goods, unless such total bid exceeds the lowest total bid based upon furnishing foreign iron, steel or manufactured goods by more than 25 percent, in which case award will be made to the lowest responsible bidder based upon furnishing foreign iron, steel or manufactured goods provided that a waiver of the Buy American requirements is approved by the federal government.

Control of Materials

All items, regardless of origin, must comply with their individual specification requirements. In the event the contract is awarded based upon using only domestic iron, steel and manufactured goods, the Contractor must supply only domestic iron, steel or manufactured goods and will be paid the domestic iron, steel or manufactured goods bid prices. The Contractor will be responsible for ensuring that the domestic iron, steel or manufactured goods are supplied in conformance with the above referenced laws. Such responsibility extends to informing all affected subcontractors and material suppliers of these specific requirements and ascertaining that iron, steel or manufactured goods being supplied are in conformance with the standard specifications.

In the event that the contract is awarded that permits a Contractor to permanently incorporate foreign iron, steel or manufactured goods in the work, the contractor may supply either domestic or foreign iron, steel or manufactured goods and if used will be paid the foreign iron, steel or manufactured goods bid prices.

- (k) Contractor agrees to post all required ARRA signage on project site.
- (l) Contractor agrees that no funding will be used for any casino or other gambling establishment, aquarium, zoo, golf course or swimming pool.

Whistleblower Protections Under ARRA

§ 1553 Protecting State and Local Government and Contractor Whistleblowers

- (a) Prohibition of Reprisals.—An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee’s duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of:
- (1) gross mismanagement of an agency contract or grant relating to covered funds;
 - (2) a gross waste of covered funds;
 - (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
 - (4) an abuse of authority related to the implementation or use of covered funds; or
 - (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.
- (b) Investigation of Complaints.—
- (1) In General.— A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint regarding the reprisal to the appropriate inspector general. Except as provided under paragraph (3), unless the inspector general determines that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint, the inspector general shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the person’s employer, the head of the appropriate agency, and the Board.
 - (2) Time Limitations for Actions.—
 - (A) In General.—Except as provided under subparagraph (B), the inspector general shall, not later than 180 days after receiving a complaint under paragraph (1) H. R. 1—184
 - (i) make a determination that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint; or
 - (ii) Submit a report under paragraph (1).
 - (B) Extensions.—
 - (i) Voluntary Extension Agreed To Between Inspector General And Complainant.— If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A) and the person submitting the complaint agrees to an extension of time, the inspector general shall submit a report under paragraph (1) within such additional period of

time as shall be agreed upon between the inspector general and the person submitting the complaint.

(ii) Extension Granted By Inspector General.— If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A), the inspector general may extend the period for not more than 180 days without agreeing with the person submitting the complaint to such extension, provided that the inspector general provides a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for the decision, which shall be provided to both the person submitting the complaint and the non-Federal employer.

(iii) Semi-Annual Report On Extensions.—The inspector general shall include in semi-annual reports to Congress a list of those investigations for which the inspector general received an extension.

(3) Discretion not to Investigate Complaints.—

(A) In General.—The inspector general may decide not to conduct or continue an investigation under this section upon providing to the person submitting the complaint and the non-Federal employer a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for such decision.

(B) Assumption of Rights To Civil Remedy.—Upon receipt of an explanation of a decision not to conduct or continue an investigation under subparagraph (A), the person submitting a complaint shall immediately assume the right to a civil remedy under subsection (c)(3) as if the 210-day period specified under such subsection has already passed.

(C) Semi-Annual Report.— The inspector general shall include in semi-annual reports to Congress a list of those investigations the inspector general decided not to conduct or continue under this paragraph.

(4) Access to Investigative File of Inspector General.—

(A) In General.—The person alleging a reprisal under this section shall have access to the investigation file of H. R. 1—185 the appropriate inspector general in accordance with section 552a of title 5, United States Code (commonly referred to as the “Privacy Act”). The investigation of the inspector general shall be deemed closed for purposes of disclosure under such section when an employee files an appeal to an agency head or a court of competent jurisdiction.

(B) Civil Action.—In the event the person alleging the reprisal brings suit under subsection (c)(3), the person alleging the reprisal and the non-Federal employer shall have access to the investigative file of the inspector general in accordance with the Privacy Act.

(C) Exception.—The inspector general may exclude from disclosure—

(i) Information protected from disclosure by a provision of law; and

(ii) any additional information the inspector general determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the inspector general determines that disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(5) Privacy of Information.—An inspector general investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(c) Remedy and Enforcement Authority.—

(1) Burden of Proof.—

(A) Disclosure as Contributing Factor in Reprisal.—

(i) in general.—A person alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in subsection (a) was a contributing factor in the reprisal.

(ii) Use Of Circumstantial Evidence.—A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including —

(I) evidence that the official undertaking the reprisal knew of the disclosure; or

(II) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(B) Opportunity for Rebuttal.—The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under subparagraph (A) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

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(2) Agency Action.—Not later than 30 days after receiving an inspector general report under subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief in whole or in part or shall take 1 or more of the following actions:

(A) Order the employer to take affirmative action to abate the reprisal.

(B) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency or a court of competent jurisdiction.

(3) Civil Action.—If the head of an agency issues an order denying relief in whole or in part under paragraph (1), has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under subsection (b)(2)(B)(i), within 30 days after the expiration of the extension of time, or decides under

subsection (b)(3) not to investigate or to discontinue an investigation, and there is no showing that such delay or decision is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

- (4) **Judicial Enforcement of Order.**— Whenever a person fails to comply with an order issued under paragraph (2), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney’s fees and costs.
- (5) **Judicial Review.**—Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order’s conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5, United States Code.

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- (d) **Non-enforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.**—
- (1) **Waiver of Rights and Remedies.**—except as provided under paragraph (3), the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any pre-dispute arbitration agreement.
- (2) **Pre-dispute Arbitration Agreements.**—except as provided under paragraph (3), no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section.
- (3) **Exception for Collective Bargaining Agreements.** — Notwithstanding paragraphs (1) and (2), an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under the collective bargaining agreement.
- (e) **Requirement to Post Notice of Rights and Remedies.**— Any employer receiving covered funds shall post notice of the rights and remedies provided under this section.
- (f) **Rules of Construction.**—
- (1) **No Implied Authority to Retaliate for Non-Protected Disclosures.**—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.
- (2) **Relationship to State Laws** — Nothing in this section may be construed to preempt, preclude, or limit the protections provided for public or private employees under State whistleblower laws.
- (g) **Definitions.**—In this section:
- (1) **Abuse Of Authority.**—The term “abuse of authority” means an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the

rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons.

- (2) Covered Funds.—the term “covered funds” means any contract, grant, or other payment received by any non-Federal employer if—
 - (A) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and
 - (B) At least some of the funds are appropriated or otherwise made available by this Act.
- (3) Employee —the term “employee”—
 - (A) except as provided under subparagraph (B), means an individual performing services on behalf of an employer; and
 - (B) does not include any Federal employee or member of the uniformed services (as that term is defined in section 101(a)(5) of title 10, United States Code).
- (4) NON-FEDERAL EMPLOYER.—the term “non-Federal employer”—
 - (A) Means any employer—
 - (i) With respect to covered funds—
 - (I) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor,

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- subcontractor, grantee, or recipient is an employer; and
 - (II) Any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds; or
 - (ii) with respect to covered funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor of the State or local government; and (B) does not mean any department, agency, or other entity of the Federal Government.
- (5) State or Local Government.—the term “State or local government” means—
 - (A) the government of each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States; or
 - (B) The government of any political subdivision of a government listed in subparagraph (A).

Appendix C

Council Resolution 16-1049

Resolution No.: 16-1049
Introduced: July 21, 2009
Adopted: July 21, 2009

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

SUBJECT: Amendment to Resolution No. 16-970, FY10 Operating Budget of the Montgomery County Government, Budget Provision No. 8 Use of the Future Federal, State, or Other Grant Non-Departmental Account as an Appropriation Mechanism for Certain Stimulus Grants

Background

1. On May 21, 2009, the County Council approved Resolution No. 16-970, Approval and Appropriation for the FY10 Operating Budget of the Montgomery County Government.
2. Budget Provision No. 8 appropriated \$20,000,000 for the Future Federal, State, or Other Grant Non-Departmental Account in the County Government Grant Fund. When the County receives funds for a program from a non-county source, the County Executive is authorized to transfer appropriation from the Account to the appropriate department or office if the non-county funding meets certain conditions. For a new grant, the program must not require any new FY10 tax-supported appropriation or future tax-supported County funds and must be \$200,000 or less.
3. The County has applied for Federal funding available as a part of the American Recovery and Reinvestment Act of 2009 (ARRA). In many cases ARRA funding, if awarded, is to be spent within two years. In order to expedite the appropriation and procurement process, the Council was asked to consider whether it would be appropriate to allow certain ARRA grants that are in excess of \$200,000 to be appropriated by a transfer from the Future Federal, State, and Other Grant Non-Departmental Account.
4. The Council President and Chair of the Management and Fiscal Policy Committee have reviewed this issue and recommend that the Council approve an amendment to Resolution No. 16-970 to allow a grant awarded under the ARRA to be appropriated by a transfer from this Account if no new County position is created under or funded by the grant award. The grant must still comply with the condition that the program must not require any new FY10 tax-supported appropriation or future tax-supported County funds.

Action

The County Council for Montgomery County, Maryland, approves the following action:

Budget Provision No. 8 of Resolution No. 16-970 is amended as follows:

This resolution appropriates \$20,000,000 for the Future Federal, State, or Other Grant Non-Departmental Account in the County Government Grant Fund to fund specific programs or activities designated in a grant, donation, contribution, reimbursement, or other non-County funding source received in FY10. When the County receives funds for a program from a non-County source, the County Executive may transfer appropriation from this Account to the appropriate fund for a department or office to support the program. The following conditions apply to the use of this transfer authority:

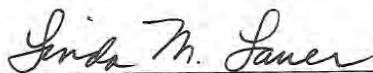
- (A) The program must not require any new FY10 tax-supported appropriation or future tax-supported County funds.
- (B) Subject to the balance in the account, any amount can be transferred in FY10 for any program which meets at least one of the following [four] **five** conditions: (1) the amount is \$200,000 or less; (2) the program was funded in FY09; (3) the program was included in the FY10 budget; (4) the program was funded by the Council in a supplemental or special appropriation in FY10; **(5) the funding was awarded under the authority of the American Recovery and Reinvestment Act of 2009 and no new County position will be created under or funded by the grant award.** Any program that does not meet one of these [four] **five** conditions must be funded by a supplemental or special appropriation.
- (C) The Executive must notify the Council within 30 days after each transfer.

The Department of Finance may transfer appropriation to the Restricted Donation Special Revenue Fund on a quarterly basis. The Council must approve a transfer for any individual donation which exceeds \$200,000 unless the donation meets one of the conditions in subparagraph (B) of this paragraph.

The Executive must approve each transfer under this paragraph and must forward to the Council a copy of a monthly list prepared by the Office of Management and Budget of each grant for which this transfer process has been used. The Office of Management and Budget must maintain a record to ensure that the total appropriation is not exceeded.

The Executive may also transfer an appropriation from a specific department or office grant appropriation in the County Government Grant Fund to the Future Federal, State, or Other Grant Non-Departmental Account when a specific grant is less than the amount appropriated. The amount of the transfer must equal the difference between the amount appropriated and the grant award.

This is a correct copy of Council action.



 Linda M. Lauer, Clerk of the Council

Appendix D. Special Appropriation Template

MEMORANDUM

(Insert Date)

TO: [Name], President, County Council

FROM: [Name], County Executive

SUBJECT: Special Appropriation #10-xx to the FYxx Operating Budget
Montgomery County Government
Department of xxxxxxxxxxxxxx
American Recovery and Reinvestment Act --Name of grant or program, \$xx,xx0

I am recommending a special appropriation to the FYxx Operating Budget of the Department of xxxxxx in the amount of \$xx,xx0 for American recovery and Reinvestment Act (ARRA) funding for **Name of grant or program**. This appropriation will fund xxxxxx.

This increase is needed because xxxxx. [Explain briefly but completely both any cost increase and the circumstances that warrant the special supplemental. This paragraph should be the same as the justification paragraph in your special supplemental appropriation #07-xx resolution. Write once! If the explanation has several parts, use:

- a.
- b.

I recommend that the County Council approve this special appropriation in the amount of \$xx,xx0 and specify the source of funds as Federal ARRA grant funds. This supplemental will reduce County General Government Fund Reserves by \$x,xxx,xx0 and is consistent with the fund balance policy for tax supported reserves. *[Only include this sentence if general fund dollars are used. If special fund, adapt sentence to relate to the specific referenced fund and impact of supplemental on fund balance policy of fund. Exclude sentence if it is grant funded.]* These funds were assumed in my March transmittal of the FYXX budget. *[Include this sentence only if after March 15th and is verified by OMB].*

I appreciate your prompt consideration of this action.

XXX: xxx

Attachment: Special Appropriation #07-xx

[Name of Addressee]

Page 2

(Insert Date)

[A second page should be avoided if possible. If required for explanatory text, include the Council President's name, page number, and correct date.

The writer's initials, attachments, and copies (if needed) would be included on the second page as shown below.]

XXX: xxx

Attachment: Special Appropriation #07-xx

cc: Relevant Department Directors, others as appropriate
Office of Management and Budget Director, others as appropriate

Resolution No: _____
 Introduced: _____
 Adopted: _____

COUNTY COUNCIL
 FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive

SUBJECT: Special Appropriation #07-xx to the FYxx Operating Budget
 Montgomery County Government
 Department of xxxxxxxxxxxxxxxx (if MCG)
 American Recovery and Reinvestment Act - Name of grant or program, \$xx,xx0

Background

1. Section 308 of the Montgomery County Charter provides that a special appropriation: (a) may be made at any time after public notice by news release; (b) must state that the special appropriation is necessary to meet an unforeseen disaster or other emergency or to act without delay in the public interest; (c) must specify the revenues necessary to finance it; and (d) must be approved by no fewer than six members of the Council.
2. The County Executive has requested the following FYxx Operating Budget appropriation increases for the **[Name of the Department]**:

<u>Personnel Services</u>	<u>Operating Expenses</u>	<u>Capital Outlay</u>	<u>Total</u>	<u>Source of Funds</u>
\$xx,xx0	\$xx,xx0	\$xx,xx0	\$xx,xx0	Federal ARRA Grant Funds

3. This increase is needed because **xxxxx**. [Explain briefly but completely both any cost increase and the circumstances that warrant the supplemental, and warrant the emergency basis. This paragraph should be the same as the justification paragraph in your CE transmittal memo. Write once! If the explanation has several parts, use:
 - a.
 - b.
4. The County Executive has requested a special appropriation to the FYxx Operating Budget in the amount of **\$xx,xx0** for **name of grant or program** and specifies that the source of funds will be Federal ARRA grant funds.
5. The public was notified by a news release.

Action

The County Council for Montgomery County, Maryland, approves the following actions:

1. A special appropriation to the FYxx Operating Budget of the Department of **xxxxxx** is approved as follows:

<u>Personnel Services</u>	<u>Operating Expenses</u>	<u>Capital Outlay</u>	<u>Total</u>	<u>Source of Funds</u>
\$xx,xx0	\$xx,xx0	\$xx,xx0	\$xx,xx0	Federal ARRA Grant Funds

2. Any fund appropriated in this resolution must not be spent for any purpose until two days after the Council has received from the County Executive a copy of the grant award letter from the Federal or state government which provides all funds to be spent.
3. The County Council declares that this action is necessary to [**CHOOSE ONE**: meet an unforeseen disaster or other emergency, or to act without delay in the public interest], and that this appropriation is needed to meet the emergency.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

Appendix E

Montgomery County American Recovery and Reinvestment Act (ARRA) Contractor Job Creation and Retention Report

The American Recovery and Reinvestment Act (ARRA) requires the significant reporting of expenditures and tracking of performance as part of its transparency and accountability provisions. ARRA funding recipients must report detailed information about the projects and activities for which the stimulus funds are being used. In order to comply with ARRA guidelines and fulfill Montgomery County's obligations, each Contract Administrators must report on jobs to the federal government on a quarterly basis.

This memo details the steps and procedures each Departmental Contract Administrator should follow as they collect information from subcontractors. The hours reported are to be inclusive of all full-time, part-time, temporary, and permanent positions supported by ARRA funding.

Departmental Contract Administrator Instructions

Step 1: Ensure all subcontractors have submitted a Full Time Year Position before beginning the contract.

1. The Full Time Year Position is the average number of hours a full-time employee would be scheduled to work over the course of the year

Step 2: On a monthly basis collect employment information from each contract's subcontractors.

1. Total Number of Employees Working on the Contract
2. Total Number of Hours Worked on the Contract

Step 3: On a quarterly basis all monthly data must be aggregated to calculate a total number of jobs created/retained for the quarter. In order to arrive at this number the following will need to be done:

1. Add all of the hours reported by each subcontractor over all of the previous three monthly reports.
2. Divide this aggregate total for each subcontractor by the number that subcontractor submitted in Step 1 (average hours worked over a full time year). This will result in the Full Time Equivalent Jobs created or retained for each subcontractor on a quarterly basis.
3. Finally, if multiple sub contractors have been used add these Full Time Equivalents together to arrive at a quarterly figure.
4. It may be required that in addition to the quarterly total you may need to report total jobs for that subcontract over time. If this is indeed a requirement one simply needs to add the totals submitted on all previous quarterly reports

Step 4: On a quarterly basis Contract Administrators will have to report aggregate employment information to the Federal Government. CountyStat should be copied on all submissions.

* Please note that in addition to subcontractor's data if a Montgomery County government employee is directly billing an ARRA grant that individuals' time also needs to be included in the job summary. Please contact CountyStat if this is the case.

Appendix F

Montgomery County American Recovery and Reinvestment Act (ARRA) Internal County Employee Job Creation and Retention Report

The American Recovery and Reinvestment Act (ARRA) requires the significant reporting of expenditures and tracking of performance as part of its transparency and accountability provisions. ARRA funding recipients must report detailed information about the projects and activities for which the stimulus funds are being used. In order to comply with ARRA guidelines and fulfill Montgomery County's obligations, each Contract Administrator must report on jobs to the federal government on a quarterly basis.

This memo details the steps and procedures each Departmental Contract Administrator should follow as they report on the ARRA work being done by full time Montgomery County Government employees. The hours reported are to be inclusive of all full-time, part-time, temporary, and permanent positions supported by ARRA funding.

Departmental Contract Administrator Instructions

Step 1: Determine how many hours a Montgomery County employee would work in a full time year.

Step 2: Ensure all County government employees who are billing to an ARRA contract have access to the proper pay code.

Step 3: On a quarterly basis each contract administrator should collect:

1. Total Number of Employees Working on the Contract
2. Total Number of Hours Worked on the Contract

Step 4: On a quarterly basis all monthly data must be aggregated to calculate a total number of jobs created/retained. In order to arrive at this number the following will need to be done:

1. Add all of the hours reported by each government employee billing to ARRA contract over all of the previous three monthly reports.
2. Divide this aggregate total by the number submitted in Step 1 (average hours worked over a full time year). This will result in the Full Time Equivalent Jobs created or retained for each subcontractor on a quarterly basis.
3. Contract administrator will then need to use his or her best judgment to divide the total jobs over the previous quarter into two categories: Job Created or Job retained.

Step 5: On a quarterly basis Contract Administrators will have to report aggregate employment information to the Federal Government. CountyStat should be copied on all submissions.